

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM MICHIGAN COURT OF APPEALS
(Whitbeck, C.J., Sawyer and Jansen, JJ.)

KEVIN SMITH,

Plaintiff/Appellee,

v.

LOUIE KHOURI, D.D.S. AND
LOUIE KHOURI, D.D.S., P.C. and
ADVANCE DENTAL CARE CLINIC,
L.L.C.,

Defendants/Appellants.

Supreme Court No. 132823

Court of Appeals No. 262139

Lower Court No. 03-047984-NH
(Oakland County Circuit Court)

BRIEF OF AMICUS CURIAE STATE BAR OF MICHIGAN

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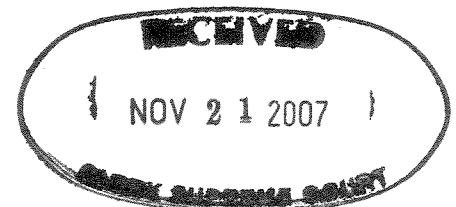


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I. INTRODUCTION

The State Bar of Michigan (the “State Bar”) is a public body corporate established pursuant to 1961 PA 236 and regulated by the Michigan Supreme Court. Its membership consists of all persons licensed to practice law in Michigan. MCL 600.901. Rule 1 of the Supreme Court Rules Concerning The State Bar Of Michigan requires the State Bar to “aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this state.” The Court has invited the Bar to fulfill this role by filing this Brief Amicus Curiae.

The operation of the case evaluation rule impacts all attorneys with a litigation practice. Because the State Bar represents a broad cross-section of interests, including attorneys who practice exclusively or primarily on the plaintiff’s side and attorneys who represent exclusively or primarily defendants, it takes no position on the first three issues posed in the Court’s Order granting leave to appeal, or on whether the trial judge correctly performed his function. Such issues are best left to the advocacy of the parties and other amici. The State Bar does think it appropriate to offer both some general observations and specific comments concerning the fourth and fifth issues raised in the order granting leave.

As a general matter, it is the State Bar’s position that the generally accepted rules that now define a party’s liability for the attorney fee component of actual costs under MCR 2.403(O)(6)(b), when costs are assessed following rejection of a case evaluation award, are in keeping with the text of the rule, and that this case does not demonstrate a need to modify well-established interpretations. To the extent that the Court may believe MCR 2.403(O) or other parts of the case evaluation rule could benefit from modification, such changes should be made

only in conjunction with a fully realized rule making process that affords individual members of the bar an opportunity to comment after adequate notice. The Court's recent handling of the proposal for an expedited summary disposition docket in the Court of Appeals provides an appropriate model.

MCR 2.403(O)(6) defines "actual costs" to include (a) "those costs taxable in any civil action"; and (b) "a reasonable attorney fee based on a *reasonable hourly or daily rate* as determined by the trial judge for services necessitated by the rejection of the case evaluation." (Emphasis added.) The italicized language was added in 1987 to expressly require trial courts to base the attorney fee sanction on an hourly or daily rate. This change and two decades of case law consistently applying it obviate the need to inquire into the structure of a party's fee arrangement with its counsel – particularly whether a contingent fee arrangement exists – when a trial court determines a "reasonable attorney fee" for purposes of case evaluation sanctions.

In addition, the State Bar opposes the sweeping re-interpretation of MCR 2.403(O)(6) advanced by Amicus Attorney General. The Attorney General's proposal, which relies heavily on federal law that has never been part of the jurisprudence interpreting MCR 2.403(O), would drastically curb trial court discretion by assigning disproportionate weight to surveys of attorney rates compiled from voluntary responses. The approach would minimize the opportunity for trial judges to give meaningful consideration to all of the *Wood* factors in determining a reasonable hourly or daily rate under the circumstances of a particular case and to achieve the purposes of the sanctions rule. It should be rejected. (Again, the State Bar takes no position on whether the trial judge properly applied the *Wood* factors in the instant case.)

II. THE BACKGROUND OF THE CASE EVALUATION RULE

A. The Text And The Purpose.

This Court first promulgated a mediation rule with statewide application – GCR 1963, 316 – effective July 1, 1980. From its inception, the rule provided for assessing a sanction against a party who rejects an evaluation and does not ultimately obtain a more favorable result as defined in the rule. GCR 1963, 316.7. *Mehelas v Wayne Co Comm College*, 176 Mich App 809, 812-813; 440 NW2d 117 (1989).

Today, MCR 2.403(O)(1) continues the application of a sanction by providing that a party that rejects an evaluation “must pay the opposing party’s actual costs” unless the verdict is more favorable to the rejecting party than the evaluation. MCR 2.403(O)(6) defines “actual costs” as:

- (a) those costs taxable in any civil action, and
- (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

The underlying purpose of the sanction feature of the case evaluation rule has been articulated in several ways. First, the rule serves as a tool to encourage early resolution of disputes. See *McAuley v General Motors Corp*, 457 Mich 513, 523; 578 NW2d 282 (1998) (“One of the aims of the mediation rule is to discourage needless litigation”); *Dessart v Burak*, 252 Mich App 490, 498; 652 NW2d 669 (2002), *aff’d* 470 Mich 37; 678 NW2d 615 (2004) (“The overall purpose of the mediation rule is to encourage settlement, deter protracted litigation, and expedite and simplify the final settlement of cases”); *Bennett v Medical Evaluation Specialists*, 244 Mich App 227, 231; 624 NW2d 492 (2000) (purpose is to “expedite and simplify the final settlement of cases”). Second, and perhaps as a means of accomplishing the

first purpose, the case evaluation rule places the burden of litigation costs on the party whose response to the evaluation prolonged the litigation. *Dessart*, 252 Mich App at 498 (“The sanction provision of the rule places the burden of litigation costs on the party who demands a trial by rejecting a proposed mediation award”); *Allard v State Farm Ins Co*, 271 Mich App 394, 398; 722 NW2d 268 (2006) (“The purpose of case evaluation sanctions is to shift the financial burden of trial onto the party who demands a trial by rejecting a proposed [case evaluation award]”).

This Court has amended the case evaluation rule several times since GCR 1963, 316 was replaced by the similar MCR 2.403 in the 1985 Michigan Court Rules. The most significant amendment for current purposes, adopted on September 25, 1987, added language to 2.403(O)(6) requiring that the attorney fee portion of case evaluation sanctions be “based on a reasonable hourly or daily rate.”

In *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326; 545 NW2d 610 (1990), the Court of Appeals explained the rationale for the 1987 amendment by quoting extensively from the commentary of the Mediation Evaluation Committee (appointed by this Court) that drafted the amendment as part of a comprehensive evaluation of the rule. According to the Committee, adding the modifying phrase following the term “reasonable attorney fee” was “intended to require mediation sanctions to be based on a reasonable daily or hourly rate rather than on a contingent fee.” *Id.* at 331 (emphasis added), citing 426B Mich 21.¹ The Committee designed the change to preclude burdensome case evaluation sanctions against defendants based on contingent fees:

¹ The full report of the Committee was published at Volume 426B of the Michigan Reports advance sheets, but it does not appear in the bound volumes.

There is no unanimity in interpreting what a “reasonable attorney fee” means for the purposes of making an award of costs. Some judges have, for example, awarded a plaintiff whose lawyer has the case on a contingent basis an attorney fee calculated as a percentage of the verdict, typically one-third, which can amount to six or seven-figures. The committee did not think this was widespread, but decided that it would be best to modify the rule to prevent it. *Id.* at 332 (quoting Committee “Discussion” at 426B Mich 21).

In light of the amendment, *Temple* vacated a sanction of over \$145,000 in attorney fees that apparently had rested in part on the existence of a contingent fee contract. The award represented an hourly rate of more than \$1,000 an hour, which the panel (writing in 1990) deemed “patently unreasonable.” *Id.* at 332.

Thus, this Court established through its supervisory authority over the Michigan Court Rules, and the Court of Appeals has reinforced through case law, a specific methodology for computing sanctions under MCR 2.403(O)(6): sanctions are to be computed based on a “reasonable hourly or daily rate.”

B. Overview Of The Case Law On Determining Attorney Fee Sanctions.

The case law that has grown up around the case evaluation rule has embraced a widely accepted list of criteria that are used to determine a “reasonable attorney fee” in a variety of contexts. In *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973), the Court of Appeals said that those factors

. . . include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.²

² *Crawley* drew these factors from Disciplinary Rule 2-106(B) of the Code of Professional Responsibility and Ethics. The list in DR 2-106(B) is substantially identical to the list in MRPC

Crawley was an auto-related wrongful death action. The workers' compensation carrier for Mr. *Crawley*'s employer, which was seeking to recoup the amount of death benefits it had paid to *Crawley*'s survivors, challenged the contingent fee charged by the attorney who represented *Crawley*'s estate and settled the wrongful death claim. After holding that the attorney's one-third fee was properly based on the gross recovery before recoupment, the Court of Appeals held that the fee was not otherwise in excess of reasonable fees for the services performed. The Court noted that: (1) the attorney was experienced and well respected; (2) he had filed pleadings, conducted discovery, begun a trial, and appeared at several post-settlement hearings; and (3) he had "thoroughly prepared for the trial and represented the plaintiff's interest in a competent professional manner." *Id.* at 738.

The *Crawley* factors were soon accepted as the guidelines for determining the reasonableness of attorney fees in virtually all contexts. In *Pettermann v Haverhill Farms*, 125 Mich App 301; 335 NW2d 710 (1983), the Court of Appeals approved their use in determining sanctions under GCR 1963, 316.7.

This Court first endorsed *Crawley* in *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982), deciding unanimously that *Crawley*'s factors for determining "reasonableness" should be applied by trial courts in setting the "reasonable [attorney] fee" recoverable by a successful plaintiff in an action to recover overdue no-fault benefits under MCL 500.3148(1):

While a trial court should consider the guidelines of *Crawley*, it is not limited to those factors in making its determination. Further, the trial court need not detail its findings as to each specific factor considered. The award will be upheld unless it appears upon appellate review that the trial court's finding on the "reasonableness" issue was an abuse of discretion.

1.5. *In re Condemnation of Private Property for Highway Purposes*, 209 Mich App 336, 341; 530 NW2d 183 (1995).

Thus, this Court – albeit in a different context – emphasized that “reasonableness” of an attorney fee is quintessentially a matter confided to the discretion of the trial judge, who is familiar with the case, the advocates, and how the result came about – as well as rates in the local community. This is particularly true in the context of case evaluation. By the time a trial judge is asked to impose case evaluation sanctions, he or she will have encountered the case “at close range” through presiding over discovery and a trial or ruling on a summary disposition motion.

Throughout this history, the cases are unwavering on one point: determining the reasonableness of the hourly and daily rate, and of the overall fee, is a matter in which trial courts possess broad discretion. See, e.g., *Joerger v Gordon Food Service, Inc*, 224 Mich App 167; 568 NW2d 365 (1997) (trial court’s decision regarding an extensive array of challenges, including the number of hours logged by prevailing counsel, was upheld); *Dean v Tucker*, 205 Mich App 547, 550; 517 NW2d 835 (1994) (in a legal malpractice action involving alleged loss of sanctions because of the defendants’ failure to file a mediation acceptance, the amount of sanctions that could be recovered was an issue for the court to decide, not a jury); *Trojanowski v Village of Kent City*, 175 Mich App 216, 226-227; 437 NW2d 266 (1988) (court had discretion to equate reasonable fees with actual fees, as a result of its application of the *Crawley* factors). As this Court implicitly recognized in *Wood*, where it emphasized trial court discretion and a deferential approach to review, the trial judge – who has witnessed the evolution of the case and is familiar with practice and standards in the community – is in the best position to assess each of the enumerated factors in the *Crawley/Wood* schematic. Of course, where the trial court abuses its discretion, the error can be corrected on appeal.

III. ARGUMENT

A. Introduction.

In its Order granting leave to appeal, this Court asked that special attention be given to: (1) whether the trial court evaluated all factors relevant to the determination of a reasonable fee; (2) whether the trial court applied such factors to all of the attorneys involved; (3) whether in particular the trial court properly applied factors pertaining to the fees customarily charged in the locality for similar legal services, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services; (4) whether it is relevant to consider the proportionality between the amount of attorney fees and the award of damages; and (5) whether, if the plaintiff retained his attorneys pursuant to a contingent fee agreement, this fact should affect the calculation of reasonable attorney fees on the basis of hourly rates.

The State Bar expresses no view with respect to the first three issues. However, in light of the attention paid to the \$450 hourly rate involved in this case, the State Bar notes that hourly rates of \$400 or more are increasingly common in the large firms and specialty practices of southeast Michigan, and in Oakland County in particular.³ The attorneys who charge such rates are typically regarded as distinguished in their practice area and have longstanding reputations of excellence and expertise. It may be appropriate to require attorneys claiming such rates to introduce evidence supporting their claim to them, but the Court should steer clear of any methodology that, like the Attorney General's proposal, essentially banishes such rates from the picture.⁴

³ This case was tried in Oakland County, and Plaintiffs' counsel have their office in Oakland County.

⁴ The approach advocated by the Attorney General would subordinate the discretion of the trial judge to unscientific surveys. For example, the Attorney General cites to the Economics of Law

B. The Proportionality Between The Amount Of Attorney Fees And The Award Of Damages May Be Considered As One Factor Among Others.

It is the State Bar's view that the third *Wood* factor – “the amount in question and the results achieved”⁵ – does provide trial judges with discretion to consider the “proportionality” between the amount of attorney fees and the award of damages in setting a sanction under MCR 2.403(O). But a trial judge may appropriately conclude that an apparent lack of proportion between the requested case evaluation sanction and the amount of the judgment does not override the time and effort expended by a prevailing party's attorney and other *Wood* factors. *Moore v Secura Ins*, 276 Mich App 195, 203; ___ NW2d ___ (2007). Decisions outside the case evaluation context have held that trial courts may exercise discretion to adjust attorney fee awards in light of the total judgment. See, e.g., *Schellenberg v Rochester Elks*, 228 Mich App 20, 45; 577 NW2d 163 (1998) (Elliott-Larsen fees). And in *Wood*, a case where the reversal of a \$50,000 award for mental anguish damages reduced the total judgment by over 80%, this Court noted that the trial court might choose to adjust the attorney fee on remand “in light of the decrease in the total judgment.” *Id.* at 589.

The weight that the proportionality factor carries in the context of a particular case is best left to the discretion of trial judges. In a simple property damage case or a no-fault case where the threshold injury healed quickly, the amount in question and the result achieved are likely to

Practice Survey. The billing rate distribution in this survey, however, only includes data based on firm average billing rates. Thus, the rates shown are a distribution of the average billing rates firms charge, and do not show from lowest reported rate up to the highest reported. To be sure, however, if the 90th percentile state-wide is \$250 (no separate breakdown for Oakland County is reported), there must be a significant number of attorneys charging a much higher rate than the average.

⁵ *Wood*, 413 Mich at 588. MRPC 1.5(a)(4) (“the amount involved and the results obtained”) is substantively identical.

be modest. In such a case, “proportionality” weighs against awarding an hourly rate beyond the average rate for personal injury lawyers in the community. Suppose, however, that for some reason – perhaps complex causation issues – a jury returns a verdict in the same amount in a complicated medical malpractice case, although the plaintiff requested a verdict many times higher than in the simple case. Although the ratio between damages asked and damages obtained will be lower in the second case, a trial judge could legitimately exercise discretion to give “proportionality” less weight in the second case than in the first. On the other hand, trial judges cannot forget that attorneys are ethically obligated to pursue a client’s claims or defenses with diligence and zeal, regardless of the value of the claim.⁶ The ethical pursuit of a \$50,000 claim sometimes demands the same amount of effort as pursuing a \$1,000,000 claim.

Furthermore, there are cases where a party chooses to “make” its opponent try a case to conclusion – for example, where the damages exposure is limited by the facts or where statutory caps limit the party’s liability in the event of an adverse outcome. In such cases, the ultimate recovery may be relatively minimal. The trial judge would in all probability be aware of the positions taken by the parties before the outcome of the trial. In all of these situations, the trial judge is best situated to assess what role “proportionality” plays in determining whether the amount of the sanction is “reasonable,” keeping in mind the purposes of the case evaluation rule: to encourage settlement, deter protracted litigation, and place the burden of litigation costs on the party whose action required continued litigation.

For example, in *Burke v Angies, Inc.*, 143 Mich App 618; 373 NW2d 187 (1985), the Court of Appeals held that fees totaling not quite ten percent of the verdict were properly

⁶ The text of MRPC 1.3, which counsels lawyers to act with reasonable diligence and promptness in representing clients, also states in part: “A lawyer should act with commitment and dedication to the interest of the client and with zeal and advocacy upon the client’s behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client.”

awarded as actual costs; the trial judge had awarded fees for the full number of hours itemized by plaintiffs' counsel, but reduced the hourly fee from \$150 to \$100. The *Burke* panel contrasted this result with *Pettermann v Haverhill Farms, Inc*, 125 Mich App 30; 335 NW2d 710 (1983), where prevailing defendants had requested actual costs including \$9,304 in attorney fees. The case had evaluated at \$12,500. In light of that proportion, the simplicity of the case (a simple horseback riding accident), and concerns about the amount of time allocated to various tasks, the Court of Appeals remanded to the trial court for an evidentiary hearing to "determine a reasonable fee based on the particular facts of the case and community legal practice." *Id.* at 33.

The trial judge is in the best position to determine how much weight to give in a particular case to the "amount in question and results achieved" factor, like all of the other *Wood* factors, when setting a reasonable hourly or daily rate. To introduce a formulaic analysis of the "proper" proportion of attorney fees to damages would eliminate the discretion that the rule expressly vests in the trial judge.

C. As A Rule, Trial Courts Should Not Consider Contingent Fee Agreements In Determining Case Evaluation Sanctions.

It is the State Bar's position that in determining a reasonable attorney fee based on a reasonable hourly or daily rate under MCR 2.403(O)(6)(b), the language of the rule means that trial judges generally should not consider the existence or terms of a contingent fee agreement between a party and his lawyer.

The rules governing the construction of statutes apply equally to court rules, including MCR 2.403. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001); *McAuley*, 457 Mich at 518.⁷ Courts give effect to the meaning of the words as they

⁷ One first principle of interpretation, however, is that "construction" is unnecessary if the language of the statute or court rule under consideration has a plain and unambiguous meaning.

ought to have been understood by those who adopted them. *Id.* Further, “every word or phrase of a statute or court rule should be given its commonly accepted meaning; however, where a word or phrase is expressly defined, courts must apply it in accordance with that definition.” *Id.*, citing MCL 8.3(a).

The “actual costs” to be awarded under MCR 2.403(O)(1) include a “reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge” MCR 2.403(O)(6)(b). Neither subrule, nor any other part of MCR 2.403, refers in any way to contingency fee arrangements or to other types of fee arrangements not based on an hourly or daily rate.

The text of the rule is thus clear on two points. First, a “reasonable attorney fee” must be calculated “based on a reasonable hourly or daily rate,” and not on any unstated alternative method. Second, the trial judge determines what is “a reasonable hourly or daily rate.”⁸ Moreover, as noted in *Temple*, 183 Mich App at 331-332, the phrase “reasonable hourly or daily rate” was added in 1987 to “prevent” trial judges from awarding sanctions calculated as a percentage of the verdict to plaintiffs who had contingent fee agreements with their lawyers. The rule should not be re-interpreted twenty years later to bring contingent fee agreements back into the mix. Now, as then, contingent fees might result in a lower award in some cases and might yield a much higher award in other cases. But in either circumstance, the contingent fee has no

If so, it must be applied as written. *Ford Motor Co v Woodhaven*, 475 Mich 425, 438-439; 716 NW2d 247 (2006).

⁸ The approach advocated by the Attorney General would deprive trial judges of much of their discretion by subordinating their judgment to unscientific surveys. While those surveys are a piece of evidence that the judge may consider, to give them primacy contradicts the express language of the rule that expressly confers on the trial judge the task of determining a reasonable hourly or daily rate.

direct bearing (nor ethically should it) on the amount of time expended by the attorneys in having to litigate the case to verdict because it was not resolved by case evaluation.

It makes eminent sense to restrict the calculation of the “reasonable attorney fee” contemplated by MCR 2.403(O)(6)(b) to an hourly or per diem rate. In this case, basing that calculation on a one-third contingency fee would yield a rate of about \$85.42 per hour for an attorney with expertise in a technical and specialized area: dental malpractice.⁹ An opposite and equally unsatisfactory scenario is not hard to imagine. If a plaintiff who is seriously injured by a defendant where liability turns on resolving simple fact questions recovers a judgment for \$3,000,000 and his attorney spent only 200 hours on relatively easy proofs, the same calculation (assuming a one-third contingency and ignoring costs of litigation) produces an hourly rate of \$5,000 (\$1,000,000 divided by 200).

This Court’s decision in *Wood* did not incorporate in the list of factors to be considered whether the case involved a contingent fee agreement – even though this was then part of DR 2-106(B). *Wood*, 413 Mich at 588. And in *McAuley*, 457 Mich at 524, this Court discounted the relevance of the attorney fee contract to the determination of a “reasonable attorney fee” as part of “actual costs” under MCR 2.403(O)(6):

[P]arties are limited by the court rule’s definition of ‘actual costs’ to recovery of a reasonable fee as determined by the trial court, regardless of the fee amount a party may contractually agree to with his attorney or the total amount he may spend on litigation. See, e.g., *In re Condemnation of Private Property for Highway Purposes*, 209 Mich App 336, 342; 530 NW2d 183 (1995)(“Reasonableness cannot be shown merely by reference to the . . . contract”). If the amount paid were sufficient proof of reasonableness, “there would be little or no reason for vesting the trial court with discretion to set the amount of an attorney fee

⁹ The jury awarded the plaintiff \$46,654.54. His attorneys claimed that 182.07 hours of effort were necessitated by defendants’ rejection of the evaluation. One-third of the judgment divided by the hours expended (\$15,551.51/182.07) equals \$85.42 per hour.

award.” *City of Flint v Patel*, 198 Mich App 153, 160; 497 NW2d 542 (1993).¹⁰

In *Department of Transportation v Randolph*, 461 Mich 757, 765-766; 610 NW2d 893 (2000), this Court drew a distinction between the condemnation statute, which directs courts to determine whether the fee *being charged to the prevailing party* is reasonable, and other statutes that, like MCR 2.403(O)(6), allow the trial court to determine a reasonable fee without regard to the fees actually being charged. In the latter context, this Court recognized, trial judges are “free to award *any* fee as long as it is reasonable.” (Emphasis in original.) For example, in *Cleary v The Turning Point*, 203 Mich App 208; 512 NW2d 9 (1993), the defendant’s attorneys had apparently agreed to represent the charitable organization at reduced rates. Plaintiffs argued that the trial court abused its discretion in awarding the defendant attorney fees under MCR 2.403(O) that were based upon an hourly rate that exceeded the actual hourly rates charged by defense counsel. The Court of Appeals held that nothing in the rule’s definition of “actual costs” required the trial court to find that reasonable attorney fees are equivalent to actual fees. *Id.* at 212 (citing *Troyanowski v Village of Kent City*, *supra*, which held that a trial court could permissibly find equivalence, but only upon consideration of the *Wood* factors). Moreover, persons who may have limited access to justice, and thus are likely to obtain representation through contingency or *pro bono* arrangements, or at reduced rates, are entitled to the same consideration in the litigation process as others with substantial economic resources.

Limiting trial judges to determining reasonable attorney fees on the basis of reasonable hourly or daily rates, while at the same time giving them broad discretion to consider and weigh all of the *Wood* factors, has brought the necessary balance of predictability and flexibility to the

¹⁰ This is not to say that a trial judge may not look to the hourly rate a prevailing party is paying to its attorneys as at least a starting point in determining a reasonable hourly or daily rate.

administration of the case evaluation rule. This framework should not be muddled by permitting consideration of contingent fee arrangements. If that were done, trial courts awarding sanctions should also in fairness consider other possible attorney fee arrangements, e.g., “result bonuses” or the “flat fee” for matters of a certain type that some corporate defendants now insist on with their defense counsel. Keeping this diversion out of the process also furthers the purposes of the sanctions feature of the case evaluation rule: to promote the early settlement of litigation and to place the burden of the costs of continued litigation on the party responsible for continuing the litigation. It is not intended to be a punitive measure. *McAuley*, 457 Mich at 518-519; *Dessart v Burak*, 252 Mich App 490, 498; 652 NW2d 669 (2002), *aff’d* 470 Mich 37; 678 NW2d 615 (2004).

Calculating an hourly rate from a contingent fee agreement after a plaintiff has recovered a very healthy verdict can seem punitive for the defendant. Calculating an hourly rate from a contingent fee agreement after a plaintiff has recovered a disappointing verdict but is nonetheless entitled to sanctions can be seen as punitive to the plaintiff, especially if plaintiff accepted the valuation. After all, plaintiff and his counsel had little choice but to persevere, and they showed that their case was meritorious. Inquiring into such an artificial rate at all obscures the discretion expressly confided in the trial judge by the court rule, and in any sample of cases both plaintiffs and defendants may suffer from idiosyncratic outcomes.

To be sure, the Court has asked only whether the contingent fee arrangement “should affect the calculation of reasonable attorney fees on the basis of hourly rates.” The State Bar is convinced it should not. The “proportionality” factor is available to trial judges under the third *Wood* factor if an award seems excessive under all the circumstances. Looking to the contingent fee agreement for information would be duplicative. Having excluded consideration of


contingent fees in amending the language of the court rule over 20 years ago, the Court should not disturb that *status quo* as long as the rule itself remains unchanged.

In this way, the framework retains the flexibility necessary for trial courts to exercise discretion in applying the *Wood* factors under the circumstances of each case. To reduce the sanctions rule to a formulaic approach runs contrary to the rule's express conferral of discretion on the trial judge, and precludes the flexibility necessary to achieve the purposes of the rule.

IV. CONCLUSION

The State Bar urges this Court to reaffirm use of the *Wood* factors by trial judges when determining a reasonable hourly or daily rate for purposes of the case evaluation sanctions rule. These factors do not include reference to the existence of a contingent fee arrangement, nor should they. Instead, trial judges should continue to be vested with discretion to determine a reasonable hourly or daily rate, giving due consideration to the *Wood* factors – including “the amount in question and the results achieved” – as warranted under the circumstances of each case. Trial judges are uniquely positioned to make such assessments.

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